

(2018) 07 CAL CK 0090
In the Calcutta High Court

Case No : A.P. No. 346 of 2018, G.A. No. 1401, 1555 of 2018

Srei Infrastructure Finance Limited

APPELLANT

Vs

Candor Gurgaon Two Developers And Projects Pvt. Ltd.

RESPONDENT

Date of Decision : 12-07-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), (2A), 34(3), 34(5), 34(6)
Code of Civil Procedure, 1908 — Section 80, 80(1), (2), (3), Order 4 Rule 1(4), 1(3),
15(4), Order 7 Rule 1, 8, Order 6 Rule 15, 15(4), Order 12 Rule 1(2), (1), Order 8
Rule 1
Amending Act of 1999 — Section 26, 26(2)
U.P. Sales Tax Act, 1948 — Section 3A(2)
Industrial Disputes Act, 1947 — Section 25F, 25FFA

Citation : (2018) 07 CAL CK 0090

Hon'ble Judges : ASHIS KUMAR CHAKRABORTY, J

Bench : Single Bench

Advocate : S.N. Mookherjee, Ratnanko Banerji, Swatarup Baerjee, Hashnuhana Chakraborty, Neelina Chatterjee, Siddhartha Mitra, Askash Bajaj, Shreya Singh,

Judgement

Ashis Kumar Chakraborty, J.

The petitioner has filed the application, A.P. No. 346 of 2018 for setting aside of the arbitral award dated December 11, 2017, read with corrective

award dated February 6, 2018 and an additional award dated March 05, 2018 passed by a sole arbitrator (hereinafter referred to as "the arbitral

award"). In the application, G.A. No. 1401 of 2018 the petitioner has prayed for stay of operation of the impugned award. In the said application the

petitioner has also prayed for condonation of its omission to issue the notice under Section 34(5) of the Arbitration Act, 1996, as amended by the Act 3

of 2016 (hereinafter referred to as "the Act"). On June 19, 2018 when this application was taken up for hearing, a serious objection was raised on

behalf of the respondent to the maintainability of the application. Therefore, before considering the petitioner's prayer for stay of the arbitral

award this Court fixed the hearing to decide the merit of the above objection raised by the respondent.

On June 29, 2018 when this Court took up the matter for hearing the objection of the respondent to the maintainability of the petitioner's

application the learned Senior Counsel for the petitioner further moved an application, G.A. No. 1555 of 2018. In the said application the petitioner

stated that after filing the application, A.P. No. 346 of 2018 within the statutory period of 120 days, on June 20, 2018 it issued a notice under sub-

section (5) of Section 34 of the Act which was received by the latter and its advocate. The petitioner also disclosed an affidavit showing receipt of the

said notice dated June 20, 2018 by the advocate of the respondent. Therefore, in the said application, G.A. No. 1555 of 2018 the petitioner prayed for,

inter alia, an order accepting the said notice dated June 20, 2018 and the affidavit annexed thereto as due compliance with the provisions in sub-section

(5) of Section 34 of the Act. According to the respondent, even the said application, G.A. No. 1555 of 2018 is not maintainable.

Mr. Siddhartha Mitra, learned Senior Counsel appearing for the respondent submitted that in view of introduction of the provisions in sub-sections (5)

and (6) of Section 34 of the Act by the Act 3 of 2016 in order to maintain an application before the Court for setting aside of an arbitral award, the

applicant must serve a prior notice on the other party and the application must be accompanied by an affidavit by the applicant endorsing compliance

with the said requirement. According to him, sub-section (5) of Section 34 of the Act in clear terms provides that an application under Section 34 shall

be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant

endorsing compliance with the said requirement. It was strenuously contended for the respondent that user of the words "shall" and "only" in

sub-Section (5) of Section 34 of the Act contemplates that the right to file an application for setting aside an arbitral award by a party arises only when

it has served a notice of the proposed application on the other party and an affidavit of service of the said notice is filed before the Court along with

the application. Therefore, according to the respondent, the term "shall" appearing in sub-section (5) of Section 34 of the Act makes the service

of prior notice of the application for setting aside of the arbitral award by the applicant upon the other party a mandatory requirement. Further, sub-section (6) of Section 34 of the Act lays down that an application for setting aside of an arbitral award "shall" be disposed of expeditiously and in any event within a period of one year from the date of service of the notice under sub-section (5) upon the other party.

Learned counsel for the respondent submitted that introduction of sub-sections (5) and (6) to Section 34 of the Act mandates, (i) an application for setting aside an arbitral award can be instituted only after a prior notice under sub-section (5) is issued to the other party, (ii) an affidavit endorsing compliance with issuance of a prior notice must accompany the application for setting aside and (iii) the application for setting aside is to be disposed

of within one year from the date of issuance of notice under sub-Section (5). Reference was made by the respondent to the 246th report of the Law

Commission in August, 2014 recommending various amendments to the Act including introduction of sub-Sections (5) and (6) to Section 34 which is reproduced below.

"...the Commission has found that challenges to arbitration awards under Sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of Sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of notice."

Learned Senior Counsel for the respondent further relied upon the statement of objects and reasons of the Amending Act 3 of 2016 introducing

various provisions to the Act, including subsections (5) and (6) to Section 34 thereof to the effect that the amendments proposed in the Bill will ensure

that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases. Relying upon the decision of the Supreme

Court in the case of Mackinnon Mackenzie & Co. Ltd.-vs-Mackinnon Employees Union reported in (2015) 4 SCC 544 it was submitted for the

petitioner that it is settled law that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at

all. It was urged that in view of the manner laid down under sub-Section (5) of Section 34 of the Act, any application challenging an arbitral award by

a party without service of prior notice to the other party is not maintainable. It was strenuously urged that since the requirement of sub-section (5) of

Section 34 is mandatory the prayers made by the petitioner in neither of the applications, G.A. No. 1401 of 2018 or G.A. No. 1555 of 2018 can be allowed.

Relying on the decisions of the Supreme Court in the cases of State of U.P. & Ors.-vs.- Babu Ram reported in AIR 1961 SC 751, State of U.P.-vs-

Manbodhan Lal Srivastava reported in AIR 1957 SC 912 and Mohan Singh-vs-International Airport Authority of India reported in (1997) 9 SCC 132 it

was argued for the respondent that it is settled law that the question as to whether a statute is mandatory or directory depends upon the intent of the

legislature and whether the object of the legislation will be defeated or furthered. The petitioner emphasised that in view of the recommendation of the

Law Commission in August, 2014 based on which the Amending Act 3 of 2016 was enacted and the aforementioned objects and reasons mentioned in

the Amending Act 3 of 2016 the requirement provided under sub-Section (5) of Section 34 of the Act of issuance of prior notice of the proposed

application for setting aside of the arbitral award upon the other party and the application to be accompanied by an affidavit showing service of such

notice upon the other party are mandatory requirements which cannot be waived. The respondent further relied upon the decision of the Supreme

Court in the case of M/s. Saree Smelting (P) Ltd.-vs-Commissioner of Sales Tax reported in 1993 Supp(3) SCC 97 and contended that presence of

the words both "shall" and "only" in sub-section (5) of Section 34 of the Act make the requirement of service of prior notice by the applicant

upon the other party mandatory and filing of an affidavit to prove service of such notice, a condition precedents for filing an application for setting

aside of an arbitral award.

Lastly, reliance was placed by the respondent on a Division Bench decision of the Patna High Court in the case of Bihar Rajya Bhumi Vikas Bank

Samiti-vs-The State of Bihar reported in (2017) 1 PLJR 285 and a Division Bench decision of the Kerala High Court in the case of Shamsuddeen -vs-

Shriram Transport Finance Company Ltd. & Anr. reported in (2016) 4 KLJ 778 = 2016 SCC On Line Ker 23728. In the said decisions the Division

Bench of the Patna High Court and Division Bench of the Kerala High Court,

respectively held that the provision contained in subsection (5) of Section 34 of the Act is mandatory. On the strength of the said decisions learned counsel for the respondent urged that in the present case, when the petitioner has filed the application, A.P. No. 346 of 2018 without complying with such mandatory requirement the same is liable to be rejected and neither of the applications, G.A. No. 14018 of 2018 and G.A. 1555 of 2018 filed by the petitioner can be entertained. The respondent pressed for dismissal of all the applications filed by the petitioner.

On the other hand, Mr. S.N. Mukherjee, learned Senior Counsel appearing for the petitioner in the application for setting aside the arbitral award strenuously contended that provision contained in sub-section (5) of Section 34 of the Act is clearly procedural and it is well settled law that the procedural provisions are always directory. In support of such contention, he placed reliance on the decisions of the Supreme Court in the cases of

Vidyawati Gupta-vs-Bhakti Hari Nayak and Ors. reported in (2006) 2 SCC 777 Sambhaji and Ors.-vs-Gangabai and Ors. reported in (2008)17 SCC

117. It was submitted that even though in the said cases the Supreme Court found that the intention of the legislature in bringing about the various

amendments in the Code of Civil Procedure (hereinafter referred to as "the Code") incorporated by the Code of Civil Procedure Amendment

Act, 1999 (hereinafter referred to as "the Amending Act of 1999") with effect from July 01, 2002 were aimed at eliminating the procedural delay

in disposal of civil suits, but such amended provisions even containing the word "shall", being procedural in nature were held to be directory. In

this regard, Mr. Mukherjee relied upon another decision of the Supreme Court in the case of Macquire Bank Ltd. "vs- Shilpi Cable Technologies

Ltd. reported in (2018) 2 SCC 74. He also cited two unreported Single Bench decisions of the Bombay High Court dated February 21, 2018 and April

19, 2018 in Commercial Arbitration Petition No. 434 of 2017 (Global Aviation Services Pvt. Ltd.-vs-Airport Authority of India) and Commercial

Arbitration Petition No. 453 of 2017 (Maharashtra State Road Development Corporation Ltd. "vs- Simplex Gayatri Consortium), respectively

holding that the provisions contained in sub-sections (5) and (6) of Section 34 of the Act are directory only.

With regard to the decision of the Division Bench of the Kerala High Court in the

case of Samsudeen & vs- M/s. Shreeram Transport Finance Co.

Ltd. (supra) cited by the respondent it was submitted by the petitioner that the said decision is not supported by any reason. According to the

petitioner, the decision of the Patna High Court is based on the provisions of Section 80 of the Code of Civil Procedure which are not akin to the

provisions of sub-section (5) of Section 34 of the Act. It was submitted that a bare reading of the provisions contained in sub-sections (1), (2) and (3)

of Section 80 of the Code indicates that the consequence of not giving any notice at all to the defendant Government, in the suit and without obtaining

leave from the Court, would entail dismissal of the suit, but none of the provisions in Section 34 of the Act provide for dismissal of the application for

setting aside of the arbitral award only on the ground of absence of any notice under sub-section (5) thereof.

Even sub-section (6) of Section 34 of Act does not provide for any consequence in case the application for setting aside of the arbitral award is not

decided within the time stipulated herein. According to the petitioner, when the provision incorporated even by subsection (6) to Section 34 of the Act

is a procedural provision providing for no consequence in case of the Court is not able to dispose of the setting aside application within the stipulated

time, the said provision cannot and do not have any bearing on the interpretation of the provision in sub-section (5) of the said section. It was urged

that there is no merit in any of the contentions raised by the respondent to oppose the maintainability of any of the three applications filed by the

petitioner.

In his reply, learned counsel for the respondent submitted that none of the decisions of the Supreme Court relied upon by the petitioner has any

application for ascertaining scope and effect of sub-sections (5) and (6) of Section 34 of the Act. According to him, in view of the Division Bench

decisions of the Patna High Court and Kerala High Court in the cases of Bihar Rajya Bhumi Vikas Bank Samity (supra) and Samsudeen & vs- M/s.

Shreeram Transport Finance Co. Ltd. (supra), respectively, the Single Bench decisions of the Bombay High Court in the cases of Global Aviation

Services Pvt. Ltd. (supra) and Simplex Gayatri Consortium (supra) cannot be accepted to be good law.

The hearing of this application was concluded on June 29, 2018. However, on

July 02, 2018 the matter was mentioned by the petitioner upon notice to the respondent when the learned counsel for the petitioner produced an order dated February 17, 2017 passed by the Supreme Court in a petition in special leave to appeal (C) No. 4475/2017, arising out of the judgment and order dated October 28, 2016 passed by the Division Bench of the Patna High Court in the said case of Bihar Rajya Bhumi Vikas Bank Samity (supra). By the said order dated September 27, 2017 the Supreme Court stayed the operation of the decision of the Patna High Court in the said case of Bihar Rajya Bhumi Vikas Bank Samity (supra). Therefore, according to the petitioner, the Division Bench decision of the Patna High Court in the said case of Bihar Rajya Bhumi Vikas Bank Samity (supra) cannot be considered for deciding the present applications. On the other hand, the learned Senior Counsel appearing for the respondent submitted even with stay of operation of the judgment passed by the Division Bench of the Patna High Court his other contentions with regard to mandatory nature of the provision under sub-section (5) of Section 34 of the Act justifies the rejection of A.P. No. 346 of 2018 along with G.A. No. 1401 of 2018 and G.A. No. 1555 of 2018.

I have considered the facts of the present case and the arguments advanced by the learned counsel appearing for the respective parties. In the cases of Babu Ram Upadhyaya (supra) and Manbodhan Lal Srivastava (supra), the Supreme Court quoted with approval the following quotation from

Crawford on the Construction of Statutes. "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".

Considering the above rule of interpretation, in paragraph 29 of the decision in the case of Babu Ram Upadhyaya (supra), the Supreme Court held as follows:

"The relevant rules of interpretation may be briefly stated thus: When a statute uses the word 'shall', prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to

the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the noncompliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.â??

In the case of Mohan Singh (supra) also cited by the respondent, the Supreme Court held that the word â??shallâ?? is not always decisive. Regard must be had to the context of subject-matter and object of the statutory provision in question in determining whether the same is mandatory and directory. The Supreme Court further held that in order to ascertain whether a particular provision or enactment shall be considered mandatory or directory, it is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration.

It is trite law that procedure is the handmade of justice, the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold. In the case of Vidyawati Gupta (supra) the Supreme Court considered the scope and effect of the provisions incorporated by the Amending Act of 1999 in Section 26(2), Order IV Rule 1(4) and Order VI Rule 15(4) of the Code with effect from July 01, 2002. By the Amending Act of 1999, sub-section (2) was introduced in Section 26 of the Code providing that in every plaint facts shall be proved by affidavit. The said Amending Act also introduced sub-rule (4) of Rule 15 under Order VI stipulating that the person verifying the pleading shall also furnish an affidavit in support of his pleadings. Rules 1 to 8 under Order VII of the Code specifically deal with the contents of the plaint which has to be complied with for the purpose of institution of a suit under Chapter VII of the Original Side Rules. In the said case, the plaintiff filed the suit before this High Court, after the Amending Act of 1999 came into effect but, the plaint did not contain an affidavit by the person who

verified the plaint. In an appeal filed before the Division Bench against an interlocutory order passed in the said suit in favour of the plaintiff, the

defendant contended that since the plaint filed by the plaintiff did not accompany an affidavit in support of the pleadings by the person verifying the

plaint the suit itself was not maintainable and on that ground alone, the impugned interlocutory order passed by the learned Single Judge was liable to be set aside.

The defendant in the said suit not only relied on the provisions incorporated in sub-rule (4) of Rule 15 under Order VI of the Code by the Amending

Act of 1999, he also relied upon the provisions contained in sub-section (2) of Section 26, read with the provisions incorporated by sub-rule (3) of Rule

1 under Order IV of the Code all introduced by the same Amending Act of 1999. Sub-section (2) of Section 26 incorporated by the Amending Act of

1999 stipulates that in every plaint, facts shall be proved by affidavit and sub-rule (3) of Rule 1 under Order IV incorporated by the said Amending

Act of 1999 stipulates that the plaint shall not be deemed to be duly instituted unless it complies with the requirements in sub-rules (1) and (2). Now

sub-rule (2) of Rule 1 under Order 12 of the Code stipulates that every plaint shall comply with the rules contained in Order VI and VII so far as their

applicable. It was contended by the defendant in the suit before the Division Bench that in view of the amended provisions incorporated by sub-rule

(4) of Rule 15 under Order VI, sub-section (2) of Section 26 and sub-rule (3) of Rule 1 under Order IV the requirement of the plaint filed in the suit

being accompanied by an affidavit affirmed by the person verifying the plaint is mandatory and no suit filed on the basis of a plaint without such

affidavit by the person verifying the pleading is maintainable. The Division Bench of this Court, however, held that if a plaint is filed without

compliance with the requirement of the aforementioned amended provisions of the Code, in the eye of law no plaint can be said to have been filed and

the same is non est.

The Division Bench further held that from the moment the error in non-filing of the affidavit by the person verifying the plaint is rectified, the plaint will

be deemed to have been properly instituted but the rectification could not relate back to a period when there was no due institution of the plaint. On

the said reasoning the Division Bench held that the suit could not be dismissed

nor could the plaint be rejected because of non-compliance with the amended provisions since the omission had been remedied by the filing of an affidavit by the plaintiff. Thus, the Division Bench held that after the defect was removed the suit must be deemed to have been duly instituted with effect from July 28, 2004 and not before that date and consequently, the interlocutory order passed by the learned Single Judge at a point of time when the suit had not been duly instituted could not survive.

It is the said decision of the Division Bench which was assailed by the plaintiff in the Special Leave Petition before the Supreme Court. The Supreme

Court, however, held that the intention of the legislature in bringing about the various amendments in the Code with effect from July 01, 2002 were

aimed at eliminating the procedural delays in the disposal of civil matters, the amendments effected to Section 26, Order IV and Order VI Rule 15, are

also geared to achieve such object, but being procedural in nature, the amended provisions are directory in nature and non-compliance therewith would

not automatically render the plaint non est, as has been held by the Division Bench of the Calcutta High Court. Further, in the case of Sambhaji

(supra) the Supreme Court was called upon to construe the following provision contained in Order VIII Rule 1 of the Code as amended by the

Amending Act of 1999.

Order - VIII

1. Written statement " The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such

other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service

of summons."

The Supreme Court held that the Proviso to Order VIII Rule 1 incorporated by the amendment Act of 1999 as quoted above, is procedural in nature

and the word "shall" appearing in the said Proviso cannot be held to be mandatory. Even in the case of Sardar Amarjit Singh Kalra " vs-

Pramod Gupta reported in (2003) 3 SCC 272, a Constitution Bench of the Supreme Court held that laws of procedure are meant to regulate

effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of

citizen under personal property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of

justice or sanctify miscarriage of justice (para-26). In this regard a reference may profitably be made to another decision in the case of Mahadev

Givind Charge â?vs- Special Land Acquisition Officer, Upper Krishna Project, Jumkhandi, Karnataka reported in (2011) 6 SCC 321, where the

Supreme Court once again held that procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to

achieve the objects of justice and expeditious disposal of the cases. The provision of procedural law which do not provide for penal consequences in

default of their compliance should be normally construed as directory in nature and should receive liberal construction. Even in the case of Macquire

Bank Ltd. (supra) the Supreme Court has reiterated that the procedural laws are normally directory.

In order to appreciate the rival contentions of the parties whether the word â?? shallâ?? used in sub-sections (5) and (6) of Section 34 of the Act should

read as mandatory or directory it is necessary to consider the provisions contained in Section 34 of the Act and the various sub-sections thereunder.

Accordingly, the provisions contained in the said Section 34 of the Act is reproduced hereinbelow:

â??34. Application for setting aside arbitral award â?" (1) Recourse to a Court against an arbitral award may be made only by an application for

setting aside such award in accordance with subsection (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the

time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise

unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. Explanation 1. â?" For the avoidance of any doubt, it is clarified that an award is in

conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention

with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2.- For the avoidance of

doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds

that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of

an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had

received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral

tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period

of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings

for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action

as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be

accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice

referred to in sub-section (5) is served upon the other party.â??

From a reading of the above provisions it is evidently clear that the substantive right of a party to challenge an arbitral award is provided by sub-

sections (2) and (2A) of Section 34 of the Act stipulating the grounds on which an arbitral award can be set aside by the Court. Sub-sections (3) of

the said Section 34 of the Act lays down the statutory period of limitation within which an application for setting aside of an arbitral award has to be

filed before the Court. Now, the provisions contained in sub-section (5) of Section 34 of the Act lays down the mode of filing an application for setting

aside of the arbitral award and sub-section (6) contemplates the time limit for expeditious disposal of an application for setting aside of an arbitral

award. Sub-section (5) of Section 34 of the Act is silent on the consequence, flowing from the petitionerâ??s default in issuing prior notice to the

respondent of the filing of the application for setting aside of the arbitral award.

Similarly, sub-section (6) of Section 34 of the Act does not provide for any consequence if the Court is not able to dispose of the application for setting

aside of the arbitral award within the time limit mentioned therein. The provisions in sub-sections are purely procedural. Although, the purpose and

intention of incorporation of the provisions contained in sub-sections (4) and (5) of Section 34 of the Act is expeditious disposal of the application for

setting aside of the arbitral award but as held by the Supreme Court in the cases

of Vidyawati Gupta (supra) and Sambhaji (supra), the said provisions being procedural in nature cannot be construed as mandatory. This interpretation of the provisions in sub-sections (5) and (6) of Section 34 of the Act is also in line with the ratio laid down by the Supreme Court in the cases of Baburam Upadhyaya (supra), Mohan Singh (supra), Sardar Amarjit Singh (supra) and Mahadev Govind (supra).

If the provisions of sub-sections (5) and (6) of the Act is held to be mandatory as contended by the respondent, the same would defeat the substantive right of party to file an application for setting aside of the arbitral award under sub-sections (2) and (2A) of the said section within the stipulated time under sub-section (3). For all these reasons, I am in respectful agreement with the decisions of the Bombay High Court in the cases of Global Aviation

Services Pvt. Ltd.-vs Airport Authority of India (supra) and Maharashtra State Road Development Corporation Ltd. vs- Simplex Gayatri

Consortium (supra), where a learned Single Judge of the Bombay High Court held that the word "shall" appearing in sub-paragraphs (5) and (6)

of Section 34 of the Act is directory. So far as the decision of the Division Bench of the Kerala High Court in the case of Samsudeen (supra) there is

no ratio in the said judgment. In view of the above findings I have already arrived at in this case I do not find any persuasive effect in the said

decision. As pointed out by the petitioner the Division Bench decision of the Patna High Court in the case of Bihar Rajya Bhumi Vikas Bank Samity

(supra) has been stayed by the Supreme Court.

The decision of the Supreme Court in the case of M/s. Saru Smelting (P) Ltd. (supra) cited by the respondent dealt with a case involving interpretation

of an exemption notification issued under the Proviso to sub-section (2) of Section 3A of the U.P. Sales Tax Act, 1948. It is settled principle of

revenue law that interpretation of an exemption notification needs strict construction of the words used in the notification. Thus, the decision of the

Supreme Court in the case of M/s. Saru Smelting (p) Ltd. (supra) cannot be applied for interpreting the provisions contained in sub-sections (5) and

(6) of the Act. In the case of Mackinnon Mackenzie & Co. Ltd. (supra) the Supreme Court held the provisions contained in Sections 25-F and 25-

FFA of the The Industrial Disputes Act, 1947 providing for service of one month's notice or payment of wages for the notice period upon the

workman in case of his entrenchment by an employer, as well as the requirement of service of sixty days notice by an employer on the appropriate

Government before an intended closure of an undertaking are mandatory. In that view of the matter, the Supreme Court applied the well settled

principle that if the manner of doing a particular Act is prescribed under a statute and the same is not followed the action is a nullity in the eye of law.

However, in view of my above findings with the provisions contained in sub-sections (5) and (6) of Section 34 of the Act are procedural and not

mandatory the said decision in the case of Mackinnon Mackenzie & Co. Ltd. (supra) has no application in this case.

For all the foregoing reasons, I am unable to find any merit in any of the contentions by the respondent for rejection of the present applications.

Further, as held by the Supreme Court in the case of Vidyawati Gupta (supra) when the petitioner has already issued the notice under Section 34(5) of

the Act to the respondent on June 20, 2018, this application must be deemed to have been filed on June 15, 2018. Let, the application A.P. No. 346 of

2018, along with G.A. No. 1401 of 2018 appear in the list, under the heading "?? Motion New" on July 16, 2018. Urgent certified copy of this

judgment, if applied for, be made available to the parties subject to compliance with all requisite formalities.